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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-423

PROVIDENT LIFE INSURANCE COMPANY, R. W. EDICK, ET AL., AS TRUSTEES OF THE PROVIDENT LIFE INSURANCE COMPANY VOTING TRUST DATED NOVEMBER 15, 1955, AND EXTENDED TO NOVEMBER 14, 1980,

Petitioners,

vs.

RESERVE LIFE INSURANCE COMPANY AND MIDLAND NATIONAL LIFE INSURANCE COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALAN L. AUSTIN
IRVING A. HINDERAKER
J. DOUGLAS AUSTIN
DARWIN SHAPIRO
P. O. Box 766
Watertown, South Dakota 57201

RICHARD P. RAUSCH
320 North Fourth Street
Bismarck, North Dakota 58501

Counsel for Respondents

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The respondents oppose the granting of the petition for a writ of certiorari for the reasons hereinafter stated.

STATEMENT AS TO REASONS WHY A WRIT SHOULD NOT ISSUE

I

There is no conflict between the decision of the Court of Appeals for the eighth Circuit and the decision of the Court of Appeals for the Second Circuit as claimed by the petitioners.

II

The decision of the Court of Appeals in this matter on the issue raised by the petition for the writ is not in conflict with applicable decisions of this Court.

III

The issues raised by the writ do not involve important questions of Federal law which require settlement by this Court.

IV

The Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

V

The decision of the Court of Appeals was correct on the issue raised by the petition and should be left standing by denial of the writ.

SUPPLEMENT TO STATEMENT OF PETITIONER AS TO THE FACTS AND HISTORY OF THE ACTION

The trustees of the voting trust for certain Provident Life Insurance shareholders constituted seven of the thirteen mem-

bers of the Board of Directors, or a majority thereof. (R4, admitted because not denied R21.) Provident Life Insurance Company was made a party only for the purpose of having it directed, if the action was successful to cause common stock certificates to be issued to the voting trust certificate holders following a declaration by the Court that the voting trust was invalid or void. The actual contest is between the respondents and the voting trustees seeking to maintain their control of the company through the medium of the voting trust over a period of 25 years. The Court of Appeals (Appendix B, page A35 of the petition) aptly stated the situation:

> "Certainly here the solicitation for the extension of the terms of the trust constituted a solicitation for the trustees' right to exercise indirect control over the corporation for many years since the trustees thereby obtained a continuation of the power to insurer re-election of present directors or replacements friendly to Provident's management."

Provident refused to furnish the respondents with the names and addresses of the voting trust certificate holders so that the views of the respondents as to whether the extension agreement should be executed could be expressed (Appendix B of the petition, Page A23.) Although copies of the voting trust agreement were filed with Provident the same were not true copies since the mailing labels were removed from the consent forms so that examination of the voting trust agreement on file with Provident did not disclose the names (See Appendix B, page A23 and see R2, page 99 for description of a consent form with the mailing label attached but which labels were all removed on filing with Provident so as to make it impossible for any shareholder or certificate holder to secure addresses for the purpose of contacting certificate holders).

The regulations adopted by the Commissioner of Insurance of the State of North Dakota effective May 1, 1966 in response to the requirements of Section 12 (g) (2) (G) [15 U.S.C. Section 78 (1) (g) (2) (G)] (See Appendix C A40 of the

petition wherein the standard form proposed by the National Association of Insurance Commissioners was described.) The regulations were offered as a part of the record. See Plaintiff's Exhibit 32, page 103 of R2 but were not set out in the record for the Court of Appeals because the parties stipulated that it was the contention of the Plaintiffs that the regulations have no application to voting trusts on the ground that they were regulated by the Securities and Exchange Act of 1934 as amended and that there was no jurisdiction on the part of the Insurance Commissioner of the State of North Dakota to regulate voting trust certificates and finally that there was no reference in the regulations to voting trust certificates.

ARGUMENT

I

There is no conflict between the decision of the Court of Appeals for the Eighth Circuit and the decision of the Court of Appeals for the Second Circuit as claimed by the Petitioners.

Since the amendment of Section 12 of the Securities and Exchange Act of 1934 to add Section 12 (g) (1) [15 U.S.C. Section 78 (1) (g) (1)] in 1964 the obligation was cast on every issuer of securities having total assets exceeding $1,000,000.00 and a class of equity security (other than an exempted security) held of record by 750 or more persons to register within 120 days after the last day of its fiscal year ended after July 1,1964. (See Appendix C page A39 of the petition.) Exemption was provided under 12 (g) (2) (G) [15 U.S.C. Section 78 (1) (g) (2) (G)] for any security issued by an insurance company if certain conditions were met (see A40 of Appendix C of the petition). Prior to the adoption of this amendment, registration was required only for securities listed on a national securities exchange and therefore unlisted securities were not subject to the proxy requirements until 1964. (See 12 (g) of the Securities

and Exchange Act (15 U.S.C. 78 (1) (a) through (f).) A voting trust certificate issued by trustees of a voting trust where the underlying security is the stock of an insurance company is issued by the voting trustees and not by the insurance company and this was the holding of the Court of Appeals (A33 Appendix B of the petition). The Court of Appeals (see same reference) stated:

> "Thus we hold that the exemption contained in Section 12 (g) (2) (G) is unavailing to the trustees of the voting trust and that the provisions of Section 12 of the Securities Exchange Act require the trustees to register the voting trust certificates.
>
> The obligation to register under Section 12 brings into play the provisions of Section 14 (a) of the 1934 Act, 15 U.S.C. Section 78 (n) (a), which reads in relevant part:
>
> 'It shall be unalwful for any person * * * in contravention of such rules and regulations as the Commission may prescribe * * * to solicit * * * any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to Section 78 (1) of the 1934 Act.' "

The petitioners contend that this holding of the Court of Appeals of the Eighth Circuit that if there was an obligation to register and no registration was made then the provisions of Section 14 (a) of the 1934 Act (15 U.S.C. Section 78 (n) (a) came into effect and it was unlawful for the trustees of the voting trust agreement to solicit a proxy or consent in respect to the securities of the trust, is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in Republic Technology Fund, Inc. vs. Lionel Corp., 483 F.2d 540 (C.A.2, 1973) (cert. denied 39 L.Ed. 2d 472) (1974).

In taking the position that there is a conflict between the decision of the Court of Appeals in this case and the Lionel Corp. case, cupra, the petitioners are overlooking the fact that the Lionel Corp. case was decided on facts that arose prior to 1964. The case in the Court of Appeals of the Second Circuit was on appeal from the decision of the United States District

Court for the Southern District of New York, 345 F.Supp. 656 and the merger of a corporation known as Hathaway, as clearly appears from the opinions in both the Court of Appeals and in the District Court, occurred on November 6, 1961. It was claimed that unaudited financial statements contained in the Hathaway proxy statement on which the plaintiffs relied in exchanging their shares in the merger with Lionel, contained materially false and misleading statements. Liability was claimed under Section 10 (b) of the Securities Exchange Act of 1934, 15 U.S.C. 78 (j) (b) and Rule 10 (b)-5 promulgated thereunder and Section 14 (15 U.S.C. Section 78 (n) and Rule 14 (a)-9). All the way through both the opinion of the District Court and the opinion in the Court of Appeals it is clear that the Hathaway common stock was unregistered. Obviously not having been registered or listed on a national exchange it was not subject to the requirements of the 1934 Act as amended in 1964 which required companies having assets exceeding $1,000,000.00 and a class of equity security held of record by more than 750 persons to register. Obviously, the District Court when it said:

> "Since Hathaway's common stock was not registered under Section 12 of the Securities Exchange Act of 1934, the Hathaway proxy statement was not subject to Section 14 and Rule 14 (a)-9 of the Act."

was correct in this holding. Likewise, when the Court of Appeals (page 545 of its opinion) said:

> "We commence by agreeing with the District Judge respect to his treatment of the claim under the Securities Exchange Act, Section 14 and Rule 14 (a)-9. The claimed violation of the proxy rules must fail because the proxies were not solicited 'in respect of any security * * * registered pursuant to Section 12' of the Act."

was clearly correct since the requirement for registration of the stock of a company not listed on a national exchange did not come into being until 1964 when Section 12 was amended by the addition of subsections (g), (h) and (i) to cover a large class of over-the-counter stocks.

The petitioner at page 15 of the petition cites the District Court case of Bound Brook Water Company vs. Jaffe, 284 F. Supp. 704, and the same case in CCH Fed. Sec. L. Reptr. paragraph 92243 at PP 97, 141-96, 142, a decision of the District Court of New Jersey in 1968. This case arose after the adoption of the amendments to Section 12 (g) of the Securities Exchange Act of 1964 but it does not appear from the two opinions of the District Court that Bound Brook Water Company had the requisite amount of assets and number of shareholders to require that its stock be registered. If in fact it did have enough assets and enough shareholders so that it should have been registered, then the decision would be applicable but we point out that this is a District Court decision and not a decision of a Court of Appeals and therefore does not involve a conflict of decisions between two Circuit Courts of Appeal. Counsel for the petitioner in the petition at page 15 cites the case of Upson vs. Ottis, 155 F.2d 606 (C.A.2, 1946) as establishing that the Second Circuit has squarely held that failure to register when registration should have been made, makes the provisions of an act inapplicable. The suit was a stockholders' derivative action to recover damages against certain persons connected with Automatic Product Corporation. It also clearly appears that under the complaint relief could be granted either under the Investment Company Act of 1940 or under New York law. It did appear that SEC had brought an action alleging that Automatic had unlawfully failed to register under the Investment Company Act. As a result of negotiations Automatic subsequently registered under the Investment Company Act of 1940. Since the Court of Appeals found the parties involved liable and granted relief under New York law, it does not clearly appear that the Second Circuit Court of Appeals squarely faced the effect of failing to register when registration should have been made. It does not even appear from the very poor record in the case that registration by Automatic was actually required.

To further illustrate that there is doubt about the holding of Upson vs. Ottis, supra, see Securities and Exchange Commis-

sion vs. S. & P. National Corp., 273 F.Supp. 863, where in connection with the approval of a plan of settlement and reorganization the possibility of commencing suits for a violation of the Investment Act of 1940 was considered. The Court said: (page 869)

> "Do the provisions of the 1940 Act, in respect of the voidability of transactions between a registered investment company and its affiliates, apply to affiliates of such unregistered investment companies as the corporate defendants were until the trustee caused them to be registered after April 18, 1966? Cf. Upson vs. Ottis, 155 F.2d 606, 610 (2d Cir.). If Upson be not, as it may not be, determinative of the question, the Plan obviates the necessity of determining it in the trustees' projected lawsuit."

On another point at page 21 of the petition counsel for the petitioner cites Sawyer vs. Pioneer Mill Co., Ltd., 190 F.Supp. 21, 23 (D. Hawaii, 1960), 300 F.2d 200, Cert. denied, 371 U.S. 814, to the effect that if registration of a security is not required because of exemption under Section 12 (g) (2) (G) the same are not subject to the provisions of Section 14 (a). It appeared that the capital stock of the corporation had been and was listed at the time of the litigation on the Honolulu stock exchange but had not been registered pursuant to the Securities Exchange Act of 1934 on Honolulu stock exchange; that it had never been listed on the Pacific Coast stock exchange and never registered on that exchange but that the capital stock was admitted to unlisted trading privileges on the Pacific Coast stock exchange; that the Honolulu stock exchange had been exempted by order of the Securities and Exchange Commission from registration under the provisions of the Securities Exchange Act of 1934 as a national securities exchange. The case involved an effort to enjoin the holding of a special stockholders meeting and from the use of certain proxy material on the ground that it violated the Securities Exchange Act of 1934. The Court held that there was no jurisdiction since there was no requirement for registration. This case clearly helps to

emphasize that there is no conflict between the decision in our case and the decision of the Circuit Court of Appeals for the Second Circuit in Republic Technology Fund, Inc. vs. Lionel Corp., supra.

Finally, this brings us to consideration of the statement in 5 Loss "Securities Regulation", 2718 (Second Edition, 1969) a portion of which is quoted at the top of page 17 of the petition, where Professor Loss states:

> "Do Sections 13, 14 and 16 apply when a class of securities should be registered under Section 12 (g) but has not been? A negative answer is suggested not only by a literal reading of these three sections, which apply only to 'registered' securities, but also by the legislative history."

However, counsel for the petitioners omitted the balance of the statement by Loss after referring to the fact that several bills involving Securities and Exchange legislation, that were not passed would have applied to Sections 13, 14 and 16 to securities "registered or required to be registered", which we think is important. Professor Loss continued:

> "Nevertheless, the Commission has taken the position that various provisions of the Investment Company Act do apply to companies that should register but do not. Townsend Corporation of America, Investment Company Act release 4045. (1964) 41-42. Contra Upson vs. Ottis, 155 F.2d 606, 610 (2d Cir. 1946) Cf. Sec. vs. S & P National Corporation, 273 F. Supp. 863, 869 (S.D.N.Y. 1967), referred to as an open question.
>
> If the Commission's view is wrong – there is presumably some limit to the administrative or judicial rewriting of statutes in order to repair drafting oversights – injunctive and criminal proceedings would still lie, of course, for violation of Section 12 (g) (1) itself. The question therefore assumes practical importance, therefore, only in the context of civil liability. * * * The plaintiff that would otherwise seek private relief for violation of the proxy rules (see pages 932 et seq., supra) might be better advised to argue not (1) that Section 14 could be or had been

> violated by an unregistered company but (2) that a company that was about to solicit or had solicited proxies, when it was in violation of the registration requirements of Section 12 (g) (1) should no more be permitted to enjoy the fruits of its violation than a company whose proxy solicitation had violated Section 14. Cf. Schwartz vs. Bowman, 156 F. Supp. 361, 364 (S.D.N.Y. 1957). Appeal dismissed sub. nom. Schwartz vs. Eaton, 264 F.2d 195 (2d Cir. 1959), infra page 2900 (violation of registration provision of Investment Company Act). Moreover, this latter argument should be equally available to the Commission itself in an injunctive action directed to the proxy solicitation of a company that was in violation of the registration requirement."

In our case the Securities and Exchange Commission at the invitation of the Court of Appeals filed a brief amicus suraie and took the position that failing to register could not absolve the voting trustees of their obligations to register and at page 10 of the memorandum for the Securities and Exchange Commission the following statement was made:

> "If we are correct that the voting trust should have registered its certificates under Section 12 (g), the fact that it has violated the law by failing to register cannot absolve it of obligations it would have had as a registered issuer – specifically the obligation to comply with the proxy requirements of the Act. Cf. Grossman v. Young, 72 F. Supp. 375, 378 (S.D. N.Y., 1947); Schwartz v. Bowman, 156 F. Supp. 361, 364 (S.D. N.Y., 1957), appeal dismissed sub nom., Schwartz v. Eaton, 264 F. 2d 195 (C.A. 2, 1959)."

II

The decision of the Court of Appeals in this matter on the issue raised by the petition for the writ is not in conflict with applicable decisions of this Court.

Rule 19 indicates as one of the grounds for the granting of a writ of certiorari that the Court of Appeals has decided a Federal question in a way in conflict with applicable decisions

of this Court. We do not find that the petitioner claims or has cited any applicable decision of this Court on the point and therefore it is urged that there is no ground for granting the writ of certiorari on this phase or provision of the rule.

III

The issues raised by the writ do not involve important questions of Federal law which require settlement by this Court.

While counsel for the respondents have not been able to find any statistics as to the number of voting trusts that have been involved in either registration under the Securities Act of 1933 or the Securities and Exchange Act of 1934, it is asserted upon information orally given by members of the staff of the Securities and Exchange Commission that the number of filings involving voting trusts is very small as compared to regular filings for other types of securities. A quick glance through the Life-Health edition of Best's Life Insurance Reports for 1974 fails to disclose (although it is not represented that a company by company check has been made) any companies controlled by voting trusts except Provident Life Insurance Company and one other North Dakota company. Much more prevalent now is the control of insurance companies by holding companies. Certainly it could not be asserted that a holding company which had only the stock of an insurance company as its assets could claim exemption because its securities related to the securities of an insurance company. Likewise, voting trust certificates are not issued by an insurance company any more than stock of a holding company is issued by the insurance company whose stock constitutes the assets of a holding company.

To further establish that there is no important question of Federal law requiring settlement by this Court, we note that the only cases of which we have any knowledge that involve the

relationship of voting trusts to the Federal Securities Laws in addition to this case were the following:

> Corporation Trust Co. vs. Logan, 52 F. Supp. 999, the leading case on the subject of the requirement to register voting trust certificates before solicitation is made of the general public (decided December 11, 1943).
>
> Greater Iowa Corporation vs. McLendon, 378F. 2d 783 (Eighth Circuit Court of Appeals, decided May 19, 1967).
>
> Knapp vs. Kinsey, 249 F. 2d 797 (Court of Appeals, Sixth Circuit, decided December 6, 1957).

IV

The Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In this case the Court of Appeals has required the trustees of the voting trust who use the voting trust as a means of controlling Provident Life Insurance Company to give the voting trust certificate holders of the voting trust the opportunity to make an informed decision and in connection therewith to have the benefit of the viewpoint of the petitioners in making such decision. This decision is in accordance with the accepted and usual course of judicial decisions of this Court and that therefore it does not appear necessary that this Court take this case in order to exercise its power of supervision.

One of the leading cases on the subject of proxy solicitations, and the use of the terms "proxy, consent and authorization" is J. I. Case Co. vs. Borak, 377 U.S. 426, 431-432, 84 S.Ct. 1555, 12 L.Ed. 2d 423, where this Court said:

> "While the respondent contends that his Count 2 claim is not a derivative one, we need not embrace that view, for we believe that a right of action exists as to both derivative and direct causes.
>
> The purpose of Section 14 (a) is to prevent management or others from obtaining authorization for corporate

action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that '(f) air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.' HR Rep No. 1383, 73d Cong, 2d Sess, 13. It was intended to 'control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which * * * (had) frustrated the free exercise of the voting rights of stockholders.' Id., at 14. 'Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.' S Rep No. 792, 73d Cong, 2d Sess, 12. These broad remedial purposes are evidenced in the language of *the section which makes it 'unlawful for any person * * * to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security * * * registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.' (Italics supplied.) While this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors', which certainly implies the availability of jucicial relief where necessary to achieve that result.

The injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders as a group. To hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief. Private enforcement of the proxy rules provides a necessary supplement to Commission action."

V

The decision of the Court of Appeals was correct on the issue raised by the petition and should be left standing by denial of the writ.

Following the passage of the Securities Exchange Act of 1934 the Commission adopted regulations to put into effect the provisions thereof and regulation 12B dealing with registration and reporting was adopted and Rule 12b-2 defined the term "fiscal year" as follows:

> "The term 'fiscal year' means the annual accounting period or, if no closing date has been adopted, the calendar year ending on December 31."

and following amendment of Section 12 by the addition of Sections 12 (g) (h) (i) adopted Rule 12g5-2 defining "total assets" as follows:

> "For the purpose of Section 12 (g) (1) of the Act the term 'total assets' shall mean the total assets as shown on the issuer's balance sheet or the balance sheet of the issuer and its subsidiaries consolidated, whichever is larger, as required to be filed in the form prescribed for registration under this section and prepared in accordance with the pertinent provisions of regulation S-X where the security is a certificate of deposit, voting trust certificate or certificate or other evidence of interest in a similar trust or agreement, the 'total assets' of the issuer of the security held under the trust or agreement shall be deemed to be the 'total assets' of the issuer of such certificate or evidence of interest."

Also following the passage of the Act, form 16 for registration of voting trust certificates was provided for filing pursuant to Section 12 (b) and has remained in substantially the same form except for the fact that it has now been expanded to cover filings pursuant to Section 12 (g). For this form see paragraph 28802 of Volume 3 CCH Federal Securities Law Reporter page 21602 and the form actually filed by the trustees of the Provident Life Insurance Company voting trust in early 1971 after the failure to register had been drawn to their attention by the Securities and Exchange Commission, which registration statement is found at page 61-68 of R2.

These regulations were authorized by the statute. Registration was required. Because not registered before solicitation of

consents, there was a violation of the law. Regulation of securities is within the police power so no possible violation of the Tenth Amendment is involved.

The authority of the Commission to make such regulations appears to be clear. Since there was a violation of the statute and the regulations in failing to register and in failing to file the proxy material, the decision of the Court of Appeals appears to be correct and should be left standing in force and effect by denial of the petition for the writ of certiorari.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

ALAN L. AUSTIN
IRVING A. HINDERAKER
J. DOUGLAS AUSTIN
DARWIN SHAPIRO
P. O. Box 766
Watertown, South Dakota 57201

RICHARD P. RAUSCH
320 North Fourth Street
Bismarck, North Dakota 58501

Counsel for Respondents